

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.**

In re

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR EPHEMERAL
RECORDING AND WEBCASTING
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)**

**Docket No. 14-CRB-0001-WR
(2016–2020)**

**RESPONSIVE BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS
AND THE NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC
LICENSE COMMITTEE ON THE COPYRIGHT ROYALTY JUDGES’ ORDER
REFERRING A NOVEL QUESTION OF LAW TO THE REGISTER OF
COPYRIGHTS REGARDING RATE DIFFERENTIATION AMONG LICENSORS**

The Copyright Royalty Judges’ September 11, 2015 Order Referring Novel Material Question of Law (the “Order”) asks whether the Copyright Act prohibits the Judges from setting rates and terms that distinguish among different types or categories of licensors. The parties’ initial briefs demonstrate that this is a contentious issue that was not properly presented in this case and that is therefore not ripe for decision.

Not a single participant in the proceeding – neither SoundExchange, acting as the authorized representative of virtually all record companies and performing artists;¹ nor any of the many participating services – proposed, briefed, or introduced evidence supporting differentiated rates or terms for different categories or types of copyright owners. As a result, no participant had the opportunity, or any reason, to introduce evidence or to respond to any such proposal, or to demonstrate the potential administrative difficulties or consequences of such rates and terms.

Based on this record, which is now closed, the Judges would have no basis on which to set

¹ George Johnson, a label and performing artist appeared separately and did not argue for differential rates based on the copyright owner.

differentiated rates and terms by category or type of copyright owner, even if that course were theoretically available under the statute.²

Where, as here, the Judges cannot properly set rates and terms that differentiate among different types or categories of copyright owners, the referred issue is an abstract question of law that cannot have any application to this case. It makes no sense for the Register to decide such an abstract issue of potentially broad and undefined applicability on the expedited schedule required by the referral, and with only limited input from the parties and potentially interested persons who were not participants in the Web IV proceeding.

Should the Register decide to rule on the referred abstract question of law, the National Association of Broadcasters (“NAB”) and the National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”) agree with Pandora, iHeartMedia, Sirius XM, A2IM, AFM, and SAG-AFTRA that the better reading of the statute is that the Copyright Act does not permit the Judges to adopt rates and terms that differentiate among copyright owners. NAB and the NRBNMLC also agree with those commenters that such rates and terms would create significant administrative difficulties and unforeseen consequences for both licensees and SoundExchange that have not been explored in the record of this proceeding.³

Universal Music Group (“UMG”) and Sony Music Entertainment (“SME”), the two largest of the major record companies, argue that the Judges may adopt such rates and terms. The third major label, Warner Music Group, has remained silent. But it is too late for those

² This stands in stark contrast to the parties’ proposals for differentiated rates and terms based on “different types of . . . services,” which are expressly mandated by section 114(f)(2)(A). The National Association of Broadcasters’ proposal for simulcasting-specific rates and terms and the National Religious Broadcasters Noncommercial Music License Committee’s proposal for differentiated non-commercial rates and terms were the subject of extensive evidence and briefing and issue was fully joined on both proposals.

³ See, e.g., Pandora’s Initial Brief at 4-6; Sirius XM’s Initial Brief at 9-16.

parties now to be advocating rates and terms that distinguish among copyright owners. UMG and SME were represented in this case exclusively by SoundExchange.⁴ It is undisputed that SoundExchange did not seek or advocate such rates and terms. Indeed, SoundExchange now argues (presumably still on behalf of UMG and SME as well as all other record companies) that:

In this proceeding, SoundExchange and the other parties proposed rates and terms that do not differentiate by licensor. Because segmentation by licensor would raise issues that no party has addressed, the parties should be given an opportunity to brief those issues in the event the Register rules such segmentation is legally permissible.

SoundExchange, Inc.'s Initial Response at 2.

The record is closed. Thousands of pages of briefing have been submitted. The Judges will have less than two months to decide this case after the Register rules. It is too late for UMG and SME to advocate a new position that they never presented in this case. Had they wanted to advocate rates and terms that differentiate based on the identity of the copyright owner, they had every opportunity to do so, but did not. It would be highly prejudicial to all of the other parties to allow them to do so now.

CONCLUSION

For the foregoing reasons, this is neither the time nor the circumstance for the Register to decide the referred question. It would be inappropriate, on the record of this case, for the Judges to set rates and terms that differentiate based on the identity of the copyright owner. If the Register does reach the question, the answer to the question posed by the Judges is “yes”: the

⁴ Initial Brief of UMG Recordings, Inc., *et al.*, at 1 (“UMG and SME are participants in this proceeding through the joint petition filed on their and others’ behalf by SoundExchange, whose board of directors includes representatives from both UMG and SME.”).

Copyright Act prohibits the Judges from adopting rates and terms that differentiate among copyright owners.

Respectfully submitted,

/s/ Bruce G. Joseph

Bruce G. Joseph (D.C. Bar No. 338236)

Karyn K. Ablin (D.C. Bar No. 454473)

WILEY REIN LLP

1776 K St. NW

Washington, DC 20006

Phone: 202-719-7000

Facsimile: 202-719-7049

BJoseph@wileyrein.com

KAblin@wileyrein.com

*Counsel for the National Association of
Broadcasters and the National Religious
Broadcasters Noncommercial Music
License Committee*

October 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I caused copies of the foregoing document to be served via email on the parties listed below, which have consented to email service. I also caused courtesy copies to be provided by email to counsel for UMG Recording, Inc., *et al.*, and counsel for A2IM, *et al.*:

<p>Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com P: 202-380-1476 F: 202-380-4592 <i>Sirius XM Radio Inc.</i></p>	<p>Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com P: 212-584-5100 F: 212-584-5200 <i>Sirius XM Radio Inc.</i></p>
<p>Paul Fakler Martin Cunniff Jackson Toof Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com <i>Counsel for Sirius XM Radio Inc.</i></p>	<p>Gary Greenstein Wilson Sonsini Goodrich & Rosati 1700 K Street, NW, 5th Floor Washington, DC 20006 ggreenstein@wsgr.com P: 202-973-8849 F: 202-973-8899 <i>Counsel for Pandora Media, Inc.</i></p>
<p>Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com P: 510-858-3049 F: 510-451-4286 <i>Pandora Media, Inc.</i></p>	<p>R. Bruce Rich Todd Larson Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com P: 212-310-8170 F: 212-310-8007 <i>Counsel for Pandora Media, Inc.</i></p>

<p>C. Colin Rushing Bradley Prendergast SoundExchange, Inc. 733 10th Street, NW, 10th Floor Washington, DC 20001 crushing@soundexchange.com bprendergast@soundexchange.com P: 202-640-5858 F: 202-640-5883 <i>SoundExchange</i></p>	<p>Glenn Pomerantz Kelly Klaus Anjan Choudhury Melinda LeMoine Munger, Tolles & Olson LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Glenn.Pomerantz@mto.com Kelly.Klaus@mto.com Anjan.Choudhury@mto.com Melinda.LeMoine@mto.com P: 213-683-9100 F: 213-687-3702 <i>Counsel for SoundExchange</i></p>
<p>Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com P: 202-642-2849 <i>Counsel for College Broadcasters Inc.</i></p>	<p>David Golden Constantine Cannon LLP 1301 K Street, NW, Suite 13000N Washington, DC 20004 dgolden@constantinecannon.com P: 202-204-3500 F: 202-204-3501 <i>Counsel for College Broadcasters Inc.</i></p>
<p>William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 P: 203-966-4770 Malone@ieee.org <i>Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.</i></p>	<p>Jeffrey Jarmuth Law Offices of Jeffrey Jarmuth 34 E Elm St Chicago, IL 60611-1016 jeff.jarmuth@jarmuthlawoffices.com P: 312-335-9933 F: 312-822-1010 <i>Counsel for Accuradio</i></p>
<p>Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Base Rd. San Antonio, TX 78209 DonnaSchneider@iheartmedia.com P: 210-832-3468 F: 210-832-3127 <i>Counsel for iHeartMedia, Inc.</i></p>	<p>George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com P: 615-242-9999 <i>GEO Music Group</i></p>

<p>Kenneth Steinthal Joseph Wetzel King & Spaulding LLP 101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com P: 415-318-1200 F: 415-318-1300 <i>Counsel for the Corporation for Public Broadcasting</i></p>	<p>Mark Hansen John Thorne Evan Leo Kevin Miller Scott Angstreich Igor Helman Leslie Pope Matthew Huppert Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 mhansen@khhte.com jthorne@khhte.com eleo@khhte.com kmiller@khhte.com chall@khhte.com sangstreich@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com P: 202-326-7900 F: 202-326-7999 <i>Counsel for iHeartmedia, Inc.</i></p>
<p>Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com P: 916-251-1600 F: 916-251-1731 <i>Educational Media Foundation</i></p>	<p>David Oxenford Wilkinson Barker Knauer, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com P: 202-383-3337 F: 202-783-5851 <i>Counsel for National Association of Broadcasters and Educational Media Foundation</i></p>
<p>Frederick Kass Intercollegiate Broadcasting System, Inc. 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com P: 845-565-0003 F: 845-565-7446 <i>Intercollegiate Broadcasting System, Inc.</i></p>	<p>Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org P: 202-513-2050 F: 202-513-3021 <i>Counsel for National Public Radio, Inc. (NPR)</i></p>

<p>Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com P: 212-872-7483 F: 212-872-1002 <i>Counsel for Pandora Media, Inc.</i></p>	<p>Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com P: 312-284-2440 F: 312-284-2450 <i>AccuRadio, LLC</i></p>
<p>Ethan Davis King & Spalding 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 edavis@kslaw.com Tel: 202-626-5400 Fax: 202-626-3737 <i>Counsel for National Public Radio, Inc.</i></p>	

/s/ Wesley E. Weeks
Wesley E. Weeks